STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

vs.

Supreme Court No. 150286
Court of Appeals No. 311441
Lower Court No. 12-721-FC

ROBIN SCOTT DUENAZ,

Defendant—Appellant.
_____/

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

This supplemental brief addresses the following three questions:

I. IS PRIOR SEXUAL ABUSE OF A CHILD "SEXUAL CONDUCT" UNDER THE RAPE SHIELD STATUTE AND IS THE ADMISSION OF SUCH EVIDENCE THEREFORE BARRED BY MCL 750.520J?

The trial court answers: YES
The Court of Appeals answers: YES
The Defendant—Appellant answers: NO
The Plaintiff—Appellee answers: YES

II. WAS EVIDENCE OF THE VICTIM'S PRIOR SEXUAL ABUSE ADMISSIBLE TO PRESERVE THE DEFENDANT'S RIGHT OF CONFRONTATION OR TO PRESENT A DEFENSE?

The trial court answers: NO
The Court of Appeals answers: NO
The Defendant—Appellant answers: YES
The Plaintiff—Appellee answers: NO

III. WAS ANY ALLEGED ERROR IN EXCLUDING EVIDENCE OF PRIOR SEXUAL ABUSE HARMLESS BECAUSE THE ALLEGED ERROR DID NOT AFFECT THE OUTCOME OF THE TRIAL?

The trial court answers: YES
The Court of Appeals answers: YES
The Defendant—Appellant answers: NO
The Plaintiff—Appellee answers: YES

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INTRODUCTION

The Defendant was convicted by jury of several counts of criminal sexual conduct against a minor child who had previously been a victim of sexual assault by her stepfather. At trial, the Defendant sought to admit evidence of the victim's prior sexual assaults to provide an alternate explanation for her sexual knowledge, physical condition, and behavioral changes. The trial court ruled that this evidence fell within the protection of the rape shield act and excluded it.

Whether the definition of "sexual conduct" in the rape shield act encompasses non-volitional sexual assaults on child victims was settled in *People v Arenda*. This Court should not change its position on this issue in addressing the Defendant's case. Not only was the *Arenda* decision based on sound reasoning, but the ability to confront the witnesses and present a defense in cases involving child victims is adequately protected by the procedures in the rape shield act and in cases such as People *v Hackett*.

This Court should affirm the decision of the Court of Appeals, and find that the rape shield act does include prior sexual assaults on child victims. Further, this Court should affirm that the Defendant was not denied his right to confront witnesses or present a defense under *Hackett*. In the event that this Court does not reach either or both of these conclusions, it should still affirm the Defendant's conviction, because any alleged error in excluding evidence of the prior sexual

assaults on the victim should be deemed harmless in light of all the other evidence presented.

STATEMENT OF FACTS

The Defendant, Robin Scott Duenaz, was charged in the instant case with the following four counts, all enhanced by second or subsequent sex offender notice (MCL 750.520f) and habitual offender fourth offense notice: 1) CSC 1st degree – penile/anal penetration with a person under 13; 2) CSC 1st degree – penile/vaginal penetration with a person under 13; 3) CSC 2nd degree with a person under 13; and 4) CSC 2nd degree with a person under 13. Although a full recitation of all of the evidence at trial is not necessary here, as this brief is limited to the issue of the admissibility of victim's prior sexual assault, a summary is offered below for context. Additional citations to the trial transcript are included in the Argument section where necessary to support the legal arguments.

The victim in this case, D.M., was seven years old at the time the Defendant assaulted her in December of 2007. In a pretrial motion, trial counsel for the Defendant sought to introduce evidence that D.M. had been sexually assaulted in the past by her stepfather. The Defendant claimed that this evidence was relevant to show an alternate source of D.M.'s emotional and physical condition after the charged assaults; and that the prior sexual abuse provided an explanation of D.M.'s knowledge of sexual matters.[1] Defense counsel also argued that he wanted to

[1] Defendant's Motion and Offer of Proof, filed on April 6, 2012

explore the prior sexual assaults to show that the victim may have fantasized or imagined any real contact with the Defendant.[2]

Pursuant to MCL 750.520j(2), the trial court performed an in-camera review of the investigation of the prior sexual abuse case involving D.M. and her stepfather and requested a complete and un-redacted copy of the police investigation.[3] These investigative reports were attached to the Defendant's Application for Leave to Appeal as Appendix C, but the contents are summarized below.

The assaults by her stepfather began when D.M. was five (the calendar year of 2005) and were continuous, but she was unable to state the exact date when the last one occurred. She first disclosed the assaults on January 2, 2007, to her mother. She said that her "daddy" would get on top of her and stick his penis in her butt and her privates, but that she didn't tell because he threatened to beat her if she did.

Based on her initial disclosure, D.M. was interviewed by a detective under the forensic interviewing protocol guidelines. During the interview, she told the detective that her dad put his private in her butt and her private, that it hurt, and that when she would cry, he would cover her mouth and nose. D.M. described that "white stuff" would come out of his "pee-pee" and that she called it "grease and oil." She said it would go on her upper thigh and pelvic area, and that he would then wipe it up with his clothes. D.M. also described her dad making her move her hand

[2] Trial Transcript, p. 158-159
[3] Motion Hearing Transcript, dated 4/18/13, p. 29, 31

on his private and that he made her put her mouth on his private, and that she would cry and try to bite it. D.M.'s stepfather was convicted by plea as a result of this abuse in St. Clair County Circuit Court case number 07-881-FC on July 30, 2007. After reviewing this information, the trial court ruled that evidence of these prior assaults on D.M. was inadmissible pursuant to MCL 750.520j, commonly known as the rape-shield act.[4]

At trial, the evidence against the Defendant centered around the testimony of D.M., as well as a second victim, A.C., whose testimony was admitted pursuant to MRE 404(b) and MCL 768.27a. D.M. met the Defendant while visiting her relatives in the Port Huron area during the holiday season in 2007. The Defendant was friends with her aunt, and he took D.M. and her 4 year-old cousin to his apartment to bake cookies. On this occasion, the Defendant took the girls' clothing, claiming he was going to wash it, and gave them a couple of his t-shirts to wear. He took the girls upstairs to his bedroom to watch television in his bed, and D.M.'s cousin fell asleep. While lying behind D.M., the Defendant penetrated her anally, causing her pain.[5] Then he moved her to a second mattress on the ground and penetrated her vaginally as well.[6]

On a second occasion, the Defendant took D.M., by herself this time, to his apartment, where he penetrated her vaginally, and then gave her money and took

[4] Trial Transcript, p. 156-157, 161
[5] Trial Transcript, p. 551-552
[6] Trial Transcript, p. 522

her to the store to purchase treats.[7] D.M. did not immediately disclose what had happened, but the matter came to light in the weeks after she returned home from Port Huron. When D.M.'s mother first asked her about what had happened with the Defendant, D.M. became shy, and put her head down as she told her.[8] Although D.M. had seemed fine during phone conversations during her visit to Port Huron and immediately after she returned home; after she disclosed the assaults, she began having behavioral outbursts, and skin breakouts.[9] Whereas she had been an agreeable child before and tried to please everyone, she became disagreeable and refused to do things.[10]

D.M. was examined by two physicians following the sexual assaults by the Defendant. The first examination took place on January 13, 2008 by Dr. Duane Penshorn. Dr. Penshorn observed that there was "slight diffuse redness on external vulva," but no "obvious scarring or trauma."[11] The second physician, Dr. Harry Frederick, observed "nonspecific erythema" or redness, on her external genitalia, and urine leakage from her urethra on January 22, 2008.[12] Dr. Frederick testified that both of these findings, however, were nonspecific to sexual assault.[13]

The other child who had been assaulted by the Defendant, A.C., testified that a few months prior, in the summer of 2007, the Defendant picked her up from the

[7] Trial Transcript, p. 557
[8] Trial Transcript, p. 368
[9] Trial Transcript, p. 378
[10] Trial Transcript, p. 384
[11] Medical Report of Dr. Penshorn, People's Trial Exhibit 3
[12] Trial Transcript, p. 465
[13] Trial Transcript, p. 466-496

airport to drive her to her uncle's house in Port Huron. The Defendant was married to A.C.'s mother, but they were living apart at the time. A.C. had flown from Arizona for a visit.[14] Instead of taking A.C. immediately to her uncle's house, he took her back to his apartment, where he watched a movie with her, struck her in the face, and penetrated her anally with his penis.[15] He then left the apartment, and returned a half hour later, when he raped her again, vaginally.[16]

On another date during her visit to Port Huron, the Defendant picked A.C. up and took her to the zoo. When they returned, he gave her a pop to drink that tasted different. A.C. recalled passing out, and when she woke up, she had no memory. The Defendant locked her in the apartment, and when he returned, he struck her again, and raped her both anally, and then vaginally.[17]

On a third occasion, the Defendant forced A.C. to attend a wedding with him and spend the night at his apartment afterward. He raped her vaginally more than once during the night.[18] On each of these occasions, the Defendant threatened A.C. if she told of the assaults.[19] After the third and final incident, A.C. did disclose the abuse.[20] These incidents involving A.C. were charged in a separate case, in which

[14] Trial Transcript, p. 587-588
[15] Trial Transcript, p. 595
[16] Trial Transcript, p. 597
[17] Trial Transcript, p. 600-602
[18] Trial Transcript, p. 605
[19] Trial Transcript, p. 595, 598, 603
[20] Trial Transcript, p. 607

the Defendant entered a plea following the trial on the charges that are the subject of this application.[21]

The Defendant did not testify on his own behalf and did not call any witnesses. At the close of the case, the jury deliberated for less than 40 minutes before returning a verdict of guilty on all counts.[22] The Defendant was later sentenced to 50 to 75 years on the CSC 1st counts. In a published opinion issued on July 10, 2014, the Court of Appeals affirmed the Defendant's conviction and sentence. The Defendant filed his Application for Leave to this Court, and this Court ordered supplemental briefing on June 3, 2015 on the issues contained herein.

[21] In light of the conviction on multiple counts of CSC 1st Degree in the instant case and the resulting exposure to lengthy prison sentences, the Defendant was offered a plea to three counts of attempted CSC 1st on the file involving A.C. to avoid the necessity of the victims having to testify in a separate trial. The Defendant took this plea and received a sentence of 38 months to 5 years, which he is currently serving concurrently to the sentence in this case. (St. Clair County Circuit Court Case No. 12-724-FC)

[22] Trial Transcript, p. 788-789

SUPPLEMENTAL ARGUMENT

I. PRIOR SEXUAL ABUSE OF A CHILD IS "SEXUAL CONDUCT" UNDER THE RAPE SHIELD STATUTE AND THE ADMISSION OF SUCH EVIDENCE IS THEREFORE BARRED BY MCL 750.520J.

A. Standard of Review

In general, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Specifically, a determination of admissibility of evidence under the rape-shield statutory exceptions is within the discretion of the trial court. *People v Adair*, 452 Mich 473; 550 NW2d 505 (1996). The Appellant preserved this allegation of error by objecting filing a pretrial motion regarding its admission.

B. Analysis

The Defendant sought to introduce evidence during his trial that the victim had been previously assaulted by her stepfather. The trial court excluded this evidence under the rape shield act. In his Application for Leave to Appeal to this Court, the Defendant asserts that prior involuntary sexual activity falls outside the definition of "sexual conduct" under the rape shield act, and is therefore not barred by the statute.

The rape shield act, found at MCL 750.520j, provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless

> and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. MCL 750.520j.

This Court should find that non-volitional sexual assaults like the one that D.M. experienced are considered "conduct" and within the protections of the rape shield statute for several reasons. First, existing precedent has presumed that child victims of sexual assault are protected by the rape shield act. Second, the text of the rape shield statute, and the statutes involving criminal sexual conduct in general, support such a conclusion; as does the legislative intent of the statute. Third, of those states that have enacted rape shield statutes with similar language to Michigan's statute, most have included prior sexual assaults in the definition of "conduct." Finally, both the rape shield act's exceptions and cases evaluating the admissibility of evidence of prior sexual assaults of victims provide ample avenues for defendants to preserve their trial rights. Therefore, exclusion of prior sexual assaults from the definition of "conduct" is unnecessary.

1. Existing precedent includes child victims of sexual assault within the protections of the rape shield act.

In *People v Arenda*, 416 Mich 1, 13; 330 NW2d 814 (1982), this Court upheld the trial court's exclusion of evidence of prior sexual conduct of a child victim pursuant to the rape shield act. Although the *Arenda* decision focused on the

constitutionality of the rape shield act in general, and not on the narrower question of whether it included prior sexual assaults, the decision to exclude the evidence at issue was predicated on a determination that sexual assaults are considered "sexual conduct" and therefore covered by the rape shield act.

This Court observed in *Arenda* that children who are victims of sexual assault are likely to be subjected to the type of inquiry the rape shield statute was designed to avoid: "the only cases in which such evidence can arguably have more than a *de minimis* probative value are ones involving young or apparently inexperienced victims. These children and others are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas. They are among the persons whom the statute was designed to protect." *Arenda*, 416 Mich at 13.

Appellate courts deciding the admissibility of evidence involving prior sexual assaults on child victims have regularly cited *Arenda* as authority for the applicability of the rape shield statute in cases of child sexual abuse. Therefore, a ruling by this court that the term "sexual conduct," as it is used in MCL 750.520j does not include sexual assaults committed on child victims would overrule established precedent, and without good reason. This Court correctly observed that the rape shield statute was enacted to guard against invasions into a complainant's sexual privacy and to avoid undue harassment. Although the circumstances surrounding a child's prior sexual victimization and an adult's prior consensual sexual encounters are different; allowing open exploration by defendants into either

of these types of experiences results in harassment, invasion of privacy, and could easily discourage victims of any age or circumstance from reporting further abuse or assault due to concerns over having to revisit incidents from the past. Considering the minimal probative worth that such evidence could have, including prior sexual assaults in the definition of "conduct" as intended by the rape shield statute does not significantly diminish any of the Defendant's rights, and this Court should not conclude any differently in this case than it did over thirty years ago in the *Arenda* case.

2. Analysis of the text of the rape shield act and related provisions supports the conclusion that the term "conduct" includes both volitional and non-volitional acts.

The term "sexual conduct" has not been used solely to describe volitional or non-volitional conduct in the criminal sexual context. Rather, it has been used to define both types of activity. Reading the chapter of the Michigan Penal Code that deals with criminal sexual conduct in its entirety, the legislature has used the phrase "sexual conduct" to describe both volitional, affirmative acts undertaken by a person, and those acts to which a victim is unwittingly subjected by a perpetrator. For example, MCL 750.520a, the "Definitions" section, provides that an "actor" means "a person accused of criminal sexual conduct." MCL 750.520a(a). A "victim" is defined as "the person alleging to have been subjected to criminal sexual conduct." MCL 750.520a(s). To conclude that the term "conduct" refers only to volitional actions ignores the fact that is has been used in defining all types of

actions, both done by an actor and done to a victim. The rape shield act's use of the term "conduct" should be read similarly.

This same point was illustrated by Justice Young in his concurrence in *People v Parks*, 483 Mich 1040; 746 NW2d 650 (2009):

> Although the section does not define the word "conduct," it does define both "actor" and "victim" with reference to their "conduct." An "actor" is someone "accused of criminal sexual conduct," MCL 750.520a(a), while a "victim" is someone "subjected to criminal sexual conduct," MCL 750.520a(p). ***By including these definitions, the Legislature expressed its understanding that "sexual conduct" is something that both "actors" and "victims" take part in-"actors" voluntarily and "victims" involuntarily. The protections of the rape shield statute, therefore, do not distinguish involuntary "sexual conduct" experienced as a victim of sexual abuse from voluntary "sexual conduct" engaged in as a consenting adult.*** To hold otherwise would presume that the Legislature intended to give prostitutes more protection than rape victims. I do not think the plain meaning of the term "conduct" within the context of the statute conveys that particular legislative intent. *Parks*, 483 Mich at 1045 (Emphasis added).

Where the legislature has sought to specify only intentional behavior, as opposed to inadvertent or accidental behavior, it has used the term "intentional" in its definitions in other sections. For example, the term "sexual contact" includes "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts." MCL 750.520a(q). This contrasts with the definition of sexual

penetration, where an intent was not required, and the word intentional is absent from the definition: "'[s]exual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r).

Although the comparison of intentional and unintentional conduct is of a slightly different nature than that of volitional and non-volitional conduct, the greater significance of these references to the definition section is that where the legislature has intended to draw a distinction between an actor and a victim; and between intentional and non-intentional conduct; it has done so. In MCL 750.520j, no such distinction is made. Rather, the statute precludes evidence of "specific instances of the victim's sexual conduct."

The only distinction drawn in the rape-shield act as it relates to action is between the terms "conduct" and "activity" in MCL 750.520j(1)(a) and (b), where the statute provides the types of evidence that may be admissible after consideration by the trial court:

> (a) Evidence of the victim's past sexual conduct with the actor
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

This use of the word "activity" as opposed to the more general "conduct" makes sense when one considers that not all "conduct" leads to pregnancy, disease, or the

presence of semen. The use of the word "activity" demonstrates an intent to limit the type of evidence that can be admitted under MCL 750.520j(1)(b) to only those things that lead to a certain result, rather than all of the victim's "conduct" in general.

In addition to the context of the criminal sexual conduct statute as a whole, the legislative history of the rape shield statute suggests that non-volitional activity is within the meaning of "conduct." Referring again to Justice Young's concurrence in *Parks*, prior drafts of the act support the conclusion that "sexual conduct" includes non-volitional activity:

> Moreover, a discarded draft of this provision supports this natural construction of the phrase "sexual conduct." "[B]y comparing alternate legislative drafts, a court may be able to discern the intended meaning for the language actually enacted." The bill, as introduced in the Senate on February 28, 1974, originally provided that "[p]rior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in prosecutions under sections 520B to 520I." The House subsequently amended the bill and passed a substitute bill that deleted the word "consensual." It is that House substitute bill that was enacted into law instead of the bill that was initially proposed. Therefore, ***the fact that the Legislature specifically deleted the word "consensual" provides additional support for the conclusion that the rape shield statute applies to both consensual and nonconsensual sexual conduct***. *Parks,* at 1045. (Emphasis added)

Both the legislative history, as well as the present wording of the criminal sexual conduct statutes indicates that the correct interpretation of the meaning of

"conduct" in the rape shield statute is to include both volitional and non-volitional conduct.

3. A large number of states utilizing "sexual conduct" language in rape shield statutes have interpreted the term to include non-volitional sexual assaults.

Although this Court is obviously not bound by the decision of any other state on the issue of whether "sexual conduct" includes non-volitional sexual assaults on victims, there are a number of other states that have enacted rape shield statutes utilizing "sexual conduct" language similar to Michigan's statute. When presented with the question at issue in this case, most of those states have interpreted this language to include sexual abuse.[23] In other states, rape shield statutes use the term "sexual behavior," and this term has also been found to include non-volitional,

[23] *State v Townsend*, 366 Ark 152, 160; 233 SW3d 680 (2006) ("[E]vidence of the prior sexual abuse of a minor is within the ambit of the rape-shield statute."); *People v Aldrich*, 849 P2d 821, 824 (Colo App 1992) ("[T]he rape shield statute encompasses involuntary acts within the meaning of prior sexual conduct...."); *Baughman v State*, 528 NE2d 78, 79 (Ind 1988) ("The evidence sought to be introduced was of the type which the legislature deemed should be excluded in a case of this nature. It falls clearly within the parameters of the statute...."); *Commonwealth v Hynes*, 40 Mass App 927, 929, 664 NE2d 864 (1996) ("Evidence of sexual abuse by a third party is generally excluded under the rape-shield statute."); *State v Carpenter*, 459 NW2d 121, 125-126 (Minn 1990) ("We find, as did the trial court, the evidence of previous sexual conduct defense counsel sought to introduce to be inadmissible under Rule 404(c)."); *State v Kelley*, 83 SW3d 36, 40 (Mo App 2002) ("The offer included evidence that the sexual [abuse] actually occurred and, therefore, must be presumed inadmissible under the rape shield statute."); *State v Rhyne*, 253 Mont 513, 519; 833 P2d 1112 (1992) ("sexual conduct of the victim which is inadmissible includes prior sexual abuse."); *State v Budis*, 125 NJ 519, 532-533, 593 A2d 784 (1991) ("When a defendant seeks to elicit evidence of the prior sexual abuse of a child, the Rape Shield Statute directs trial courts to conduct a pre-trial in camera hearing."); *State v Montoya*, 91 NM 752, 753, 580 P2d 973 (NM App 1978) ("Sexual intercourse is sexual conduct whether by consent or force. Section 40A-9-26(A), supra, is not limited to sex by consent; rather, by its unlimited wording, it applies to all forms of past sexual conduct."); *Commonwealth v Johnson*, 389 Pa Super 184, 188, 566 A2d 1197 (1989) ("[A]ssaultive sexual activity is covered by the Rape Shield Law...."); *Ex parte Rose*, 704 SW2d 751, 756 (Tex Crim App 1984) ("Reading the phrase or term 'sexual conduct' in the context in which it is used in in § 22.065 and in accordance with common usage, we hold that it encompasses sexual activity or conduct whether willingly engaged in or not....")

sexual assault.[24] States using the term "sexual activity" have also included non-volitional assault.[25]

A minority of states have concluded that rape shield statutes do not include non-volitional sexual assaults, but many of those states' statutes have excluded this type of activity explicitly in the language of the statute, or by way of examples included in the definitions. States such as Florida and New Hampshire specifically refer to "prior *consensual* sexual activity" in the text of the statute.[26] Other states, such as Georgia and Washington, provide a non-exhaustive list of examples of types of conduct that are barred. Georgia's statute, but way of example, reads: "evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards."[27]

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[24] *State v Jones*, 490 NW2d 787, 790 (Iowa 1992) ("We think the term past sexual behavior as it is used in the rule clearly encompasses prior sexual abuse perpetrated upon the victim"); *State v Michel*, 633 So 2d 941, 944 (La App 1994) ("Article 412 was correctly applied in this case to prevent any exploration of a possible sexual molestation of the victim in 1988."); *State v Jacques*, 558 A2d 706, 708 n. 2 (Me 1989) ("We reject, as providing insufficient protection to victims, the defendant's proposed interpretation of 'sexual behavior' to apply only to a victim's 'volitional sexual behavior.' "); *State v Wright*, 97 Or App 401, 406; 776 P2d 1294 (1989) ("We hold that 'past sexual behavior' means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person.")

[25] *State v Bass*, 121 NC App 306, 309-310; 465 SE2d 334 (1996) ("We conclude that the prior abuse alleged here is "sexual activity" within the ambit of Rule 412); *State v Smelcer*, 89 Ohio App 3d 115, 122; 623 NE2d 1219 (1993) ("The trial court refused to allow the admission of the evidence, stating that the rape shield law precluded evidence concerning prior sexual abuse of [the victim]. We find that this evidence was properly excluded.")

[26] Fla Stat § 794.022; N H Evid Rule 412

[27] GA Code Ann § 24-2-3

These states that exclude prior assaults from their rape shield statutes have focused the protections of the statute on deliberate, volitional conduct within the text of the statute. Therefore, it appears that in those states where prior sexual assaults are excluded from rape shield protections, the legislature was clear in its intention to do so. By contrast, in states with language like Michigan's, courts have generally concluded that "sexual conduct" includes prior sexual assaults. A finding that non-volitional sexual assault is within the definition of conduct under the wording of Michigan's rape shield act is consistent with most other jurisdictions.

4. Excluding non-volitional sexual assaults from the protections of the rape shield act is not necessary because mechanisms exist within the act itself and existing caselaw to protect the Defendant's right to confrontation and to present a defense.

The interests served by rape shield statutes have been determined to be substantial, and include guarding against a victim's sexual privacy and protecting him or her from undue harassment. *Arenda*, 416 Mich at 9. Rape shield statutes also serve to bar evidence that "may distract and inflame jurors and is only of arguable probative worth." *Id.* Barring admission of evidence of prior sexual assaults on a victim serves the important purposes of the rape shield statute, yet still leaves an avenue for effective cross examination and preservation of the defendant's rights. The rape shield statute itself provides for an in camera hearing to determine admissibility where the evidence is material to a fact at issue, and that its inflammatory or prejudicial nature does not outweigh its probative value. MCL 750.520j(2).

Further, in *People v Hackett*, 421 Mich 338 (1985), this Court declared that the legislature's enactment of the rape shield statute is not a declaration that evidence of sexual conduct is never admissible. Specifically, this Court discussed times where this type of evidence would be material and should be admitted, such as where it would show the complaining witness's bias; where it may show an ulterior motive for making a false charge; and in a related issue, where the complainant has made false accusations of rape in the past. *Hackett*, 421 Mich at 348-349.

In these situations, this Court entrusted the determination of admissibility to the sound discretion of the trial court, cautioning courts to "be mindful of the significant legislative purposes underlying the rape-shield statute," and to "always favor exclusion of evidence of a complainants sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* at 349.

Where the allegations of prior sexual assault are false, *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007) makes clear that the rape shield statute is not implicated. Therefore, credibility issues that more commonly arise where a false accusation has been made may be fully explored by defendants in cross examining victims, without the rape shield impeding them in any way.

Where a defendant seeks to show that a victim has age inappropriate knowledge, or motivation to fabricate allegations, *People v Morse*, 231 Mich App

424, 437; 586 NW2d 555 (1998) provides an avenue to admit evidence of a victim's prior sexual assaults upon a showing that: 1) the defendant's proffered evidence is relevant; 2) the defendant can show that another person was convicted of criminal sexual conduct involving the victim; and 3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding. *People v Morse*, 231 Mich App 424, 437; 586 NW2d 555 (1998).

Between the provisions in the rape shield statute for an in camera hearing, and the guidelines set forth in the *Hackett* and *Morse* cases assigning to the trial court the task of balancing the interests of the victim and the defendant, a defendant is able to explore those ways in which the prior sexual assault on a child victim may be material or admissible, while still protecting the privacy interests of young victims whose "sexual past" was clearly not comprised of acts that they engaged in voluntarily.

To remove prior sexual assaults on children from the definition of "conduct" under the rape shield act strips child victims of the protections afforded by the in camera hearing procedure. What will undoubtedly be an already distressing experience for a victim will be worsened if defendants are permitted to make an unfettered inquiry into their past victimization. Young victims would potentially be subjected to questioning about assaults that were forced upon them, while adults would be protected from questioning about consensual activity. Such a result seems illogical in light of the express purposes of the statute. This result also seems needless and severe considering the mechanisms already in place to preserve the

defendant's rights to utilize evidence of prior sexual assaults within the framework provided by the rape shield act and the *Hackett* and *Morse* cases.

Overall, there are sufficient guarantees already existing to afford defendants a reasonable opportunity to test the truth of witness testimony without taking the additional step of excluding victims of prior sexual assaults from the protections of the rape shield act that was intended to protect their privacy. This Court should be satisfied that these other avenues for cross examination of victims ensure that defendants may adequately defend against charges of criminal sexual conduct, and should continue to interpret the rape shield act as including evidence of prior sexual assaults on children.

II. EVIDENCE OF THE VICTIM'S PRIOR SEXUAL ABUSE WAS NOT ADMISSIBLE TO PRESERVE THE DEFENDANT'S RIGHT OF CONFRONTATION OR TO PRESENT A DEFENSE.

A. Standard of Review

As stated in the previous section, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Adair*, 452 Mich at 485.

B. Analysis

The Sixth Amendment guarantees the Defendant the right to both confront the witnesses against him, and to present a defense. This right, however, is not unfettered. The Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292, 295 (1985). This right "is subject to a balancing test involving other legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, safety of the witness, or interrogation that is repetitive or only marginally relevant." *Michigan v Lucas*, 500 US 145; 111 S Ct 1743 (1991).

In *Arenda*, this Court noted that evidence of sexual history may have more than a "*de minimis* probative value" in cases involving "young or apparently inexperienced victims." *Arenda*, 416 Mich 13. Later, this Court observed that such evidence would also be admissible where it showed bias; ulterior motive for making

a false charge, or false accusations of rape in the past. *Hackett*, 421 Mich at 348. In order to balance the interests of the victim with the defendant's right to a reasonable opportunity to test the truth of a witness's testimony, this Court set forth a framework for trial courts to evaluate admissibility of evidence of sexual history in *Hackett*:

> [W]e conclude that the hearing procedure will best accomplish the required balancing. A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguard the defendant's right to a fair trial. *Hackett*, 421 Mich 350.

The defendant must first make an offer of proof to demonstrate relevance for a purpose distinct from using sexual conduct as evidence of character or for impeachment. If such a showing is made, the trial court must conduct an in camera hearing pursuant to MCL 750.520j(2). *Id.* In weighing the interests of the parties, this Court emphasized: "the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right of confrontation." Therefore, it is not just any intrusion on this right, but one that *unduly* infringes, that would support admissibility.

The Defendant contends that the prior sexual assault on D.M. should have been admitted to show that her age-inappropriate sexual knowledge was not learned from him, pursuant to the *Morse* case, discussed in the previous section. As provided in *Morse*, where a defendant seeks to admit evidence of a victim's prior

sexual assaults for purposes of showing age inappropriate knowledge, or motivation to fabricate allegations, trial courts must hold an in-camera hearing to determine the following: 1) whether the defendant's proffered evidence is relevant; 2) whether the defendant can show that another person was convicted of criminal sexual conduct involving the victim; and 3) whether the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding. *Morse*, 231 Mich App at 437.

The *Morse* court cited several out-of-state decisions as guidance in making its decision to admit or exclude evidence:

> We hold that under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge....
>
> We further hold that this particular exception must be narrowly drawn. When prior sexual abuse is tendered to explain age-inappropriate knowledge, the proof must be carefully examined before admission.
>
> Contrary to previously noted common perception, child victims are often taken advantage of by more than a single abuser. The rebuttal of inferences created by age-inappropriate sexual knowledge is not an open invitation to indiscriminately present prior episodes of sexual abuse. The prior sexual conduct must be sufficiently similar to defendant's alleged conduct to provide a relevant basis for its admission. It must engage the same sexual acts embodied in the child's testimony. Further, ***if the prior sexual conduct cannot fully rebut the knowledge displayed, if it failed to account for certain sexual details unique to the charged conduct, its admission should be precluded.*** Simply put, the prior sexual conduct must account for how the child could provide the testimony's sexual detail without having suffered defendant's alleged conduct. *Morse*, at 434, *quoting People*

v. Hill, 289 Ill App 3d 859, 862-865; 683 NE2d 188 (1997)(Emphasis added)

In the case before this court, the distinctions between the prior sexual assault and the charges against the Defendant were significant and the trial court did not err in concluding that evidence of the prior assaults, which occurred years prior, should not be admitted. The assaults in D.M.'s prior case were numerous, and violent, at the hands of a family member. The only similarity between those assaults and those of the Defendant is that there was both anal and vaginal penetration in each case.

In her testimony against the Defendant, the victim provided certain details of her assaults that she would not have learned from the prior case, and that could not be fully rebutted by presentencing evidence of her prior assaults. Specifically, the way the Defendant went to apply lotion to his penis before assaulting her, and also exact details about the design of his underwear could not have been derived from the previous assaults. They were unique to the Defendant's charged conduct. It should also be noted that nowhere in the opening or closing arguments did the prosecution ever suggest to the jury that the Defendant must have done these sexual things to the victim or she wouldn't have any knowledge of them. Therefore, the Defendant was not facing an argument that the victim could only know of these acts from him with no way to respond.

The Defendant also believes the evidence of a prior assault should have been admitted as an alternative explanation for the urine leakage that was described by

Dr. Frederick. He claims that the prosecutor implied a link between the Defendant's assault on the victim and the physical finding, but Dr. Frederick's testimony does not support this assertion. Dr. Frederick observed "nonspecific erythema," or redness on D.M.'s external genitalia, and fluid leakage from her urethra.[28] In response to the question of whether these findings were significant to him, he replied:

> Not regarding sexual abuse. At least redness is always nonspecific, and at a time of remote disclosure, which would be greater than probably seven to ten days, have no meaning from assault because generally the, um, redness is very rapidly gone in this area. The tissue heals very well and it's kind of like some of the inside of your mouth, some of that tissue is similar and, and the healing is very rapid compared to other areas like your skin surface on your arm, which – or your leg, which would take considerable amount of time. The healing in the genital area is generally quite rapid.[29]

Dr. Frederick also stated that the urine leakage was nonspecific to sexual assault.[30] He stated that urinary tract infections can cause the urethra to leak fluid, and that those infections could have several possible causes:

> The issues with that could be due to irritation of the bladder from either infection or some other cause. It can be due to too small of an opening with constant irritation. So there's a variety of things that can cause problems in that area.[31]

[28] Trial Transcript, p. 465
[29] Trial Transcript, p. 466
[30] Trial Transcript, p. 468
[31] Trial Transcript, p. 469

When asked if urinary tract infections were ever an indicator of sexual abuse, Dr. Frederick stated that he was aware of one study that showed children with a history of sexual abuse had urinary tract infections at a higher rate than the random matched population, but that it has never been quantified and it was not a suggestive or specific indicator of abuse.[32]

In light of Dr. Frederick's testimony, there is no foundation for the admission of evidence about the victim's prior sexual assault to show an alternative explanation for the urine leakage. Dr. Frederick's testimony was that there were no findings at the time of his exam that were specific to abuse. While he did explain that such findings could have healed in time, this only supports the exclusion of evidence of a prior assault. Clearly, if the findings of his exam were nonspecific within a few weeks of the assault by the Defendant, an assault that occurred over a year earlier would have absolutely no bearing on his findings. The trial court properly excluded the evidence on this theory as well.

Finally, the Defendant believes that the evidence should have been admitted to give an alternate explanation for the behavioral changes exhibited by the victim. The sexual assault charged in the defendant's case occurred in or around December of 2007 and January of 2008, almost a year after D.M.'s disclosure of what her stepfather did to her. Her mother was clear in her testimony that D.M.'s behavioral changes arose subsequent to her disclosure of the Defendant's conduct.[33] Had there

[32] Trial Transcript, p. 469
[33] Trial Transcript, p. 368, 371, 378, 380-381, 384

been some showing that residual effects on her behavior were lingering from the previous assault, the Defendant's argument to admit this evidence may have and some merit. However, where the evidence did not support any rational conclusion that D.M.'s changes in behavior were related to her prior assaults, the trial court properly excluded the evidence. This was not a situation where the abuse by two individuals was occurring concurrently. Rather, the assaults by her stepfather began years before and were ultimately disclosed approximately a one year before the incident with the Defendant occurred. In light of the significant separation in time between the two time frames of abuse, the relevance of the prior abuse diminishes considerably. Weighing the obvious invasion of D.M.'s privacy against the minimal value of such evidence to the defense, the trial court did not err in precluding the Defendant from admitting the evidence of the prior abuse to explain the victim's behavior changes.

Under *Hackett*, the trial court is instructed that it should favor exclusion where it would not unconstitutionally abridge the defendant's right to confrontation. While the Defendant may have been able to distract the jury from the charges by referencing the victim's prior sexual assault, or possibly present her as a confused child who had been exposed to sexual acts by someone else, in presenting evidence of the prior assaults, it is clear that this evidence would have done little to provide an alternate explanation for D.M.'s physical or emotional condition. In addition, because of the details of the assault by the Defendant, her prior abuse could not have fully rebutted her testimony.

Balancing the privacy interests of D.M. against the Defendant's right to confront her and to present a defense, the trial court did not err in excluding the evidence of her prior assaults, which was marginally relevant to any of the theories advanced by the defense.

III. ANY ALLEGED ERROR IN EXCLUDING EVIDENCE OF PRIOR SEXUAL ABUSE WAS HARMLESS BECAUSE THE ALLEGED ERROR DID NOT AFFECT THE OUTCOME OF THE TRIAL.

A. Standard of Review

As stated in the previous sections, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Adair*, 452 Mich at 485.

B. Analysis

Even if this court were to find that the evidence of the prior assaults on D.M. should have been admitted, reversal of the Defendant's convictions is not required in this case. Errors in the admission of evidence do not require reversal unless, after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight of the properly admitted evidence. MCL 769.26; MCR 2.613(A); *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001). Similarly, the alleged violation of the Confrontation Clause that the Defendant believes occurred when he was not permitted to present this evidence would not require reversal if the error was harmless. A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640; 628 NW2d 540 (2001).

The Defendant argued in his Application for Leave that an alternate source should have been presented for D.M.'s behavioral changes and age-inappropriate

knowledge, and that had such an alternative been presented, he was "highly likely to prevail in this contest." The Defendant's confidence in a different outcome, had the jury been presented with evidence of D.M.'s prior sexual assaults, disregards the overwhelming evidence establishing his guilt. The force of the evidence presented by the prosecution would not have been diminished in any way had the jury learned that D.M. had experienced sexual assaults years before the Defendant assaulted her, and therefore, any alleged error must be deemed harmless.

The trial prosecutor did not argue at any point in either closing or rebuttal argument that D.M. would not have known how to describe acts of sexual penetration had she not experienced them during the Defendant's assaults. Therefore, the Defendant's argument that the evidence of prior assaults was necessary to show the victim's age-inappropriate knowledge loses some of its weight. Furthermore, D.M.'s description of the assaults by the Defendant contained details that were not a part of the prior assaults, such as his application of lotion to his penis prior to penetrating her, and her description of his seasonal Christmas boxers. These details demonstrated that she was not just a confused child that had transferred the experience of being assaulted by her stepfather onto the Defendant. Even if the Defendant had been able to raise the issue of the prior assaults before the jury, it would not have caused the jury to doubt that she had been assaulted by the Defendant. Her testimony contained too many compelling, unique details to be discounted simply because she had also been subjected to sexual penetrations by her stepfather in previous years.

Even if the jury had been presented with the prior assault as an alternate explanation for the victim's behavioral changes, the victim's mother testimony would have demonstrated that these changes only occurred after disclosure of the abuse by the Defendant. The prior sexual assault occurred approximately two years before the instant offense, making the argument that the prior sexual assaults could be the cause of the behavioral changes implausible. Although the Defendant suggests D.M. was not actually traumatized by abuse by the Defendant, but rather by the mere thought of having to endure medical examinations and investigations and court processes as she had in the previous case; this theory makes little sense. D.M. would not have become upset about the investigative and prosecutorial aftermath of being sexually abused, had she not actually been abused again.

Assuming that evidence of the prior assault had been admitted for the Defendant's proffered purpose of showing an alternative explanation for the urine leakage, Dr. Frederick's testimony gave no basis to support this conclusion, and the jury would not have given the theory any weight. Dr. Frederick was clear that there were no findings at the time of his exam that were specific to abuse. Assaults years prior would not have had any probative value for the jury. Furthermore, the prosecutor did not argue in closing that Dr. Frederick's physical findings demonstrated, or even suggested, that the assault occurred. Rather, the prosecutor merely noted that the lack of physical findings was not inconsistent with what D.M. had reported.[34] Therefore, admission of any evidence of a prior sexual assault

[34] Trial Transcript, p. 722-725

would have done nothing to advance the Defendant's defense as it related to the urine leakage or other physical findings.

Despite the Defendant's urging that the jury would have evaluated the victim's credibility differently had they known about the prior sexual assaults, when this Court considers the detail with which the victim described the Defendant's conduct, such an argument becomes less compelling.

D.M.'s testimony about her sexual assault and the surrounding circumstances could not have been simply recollections of her prior victimization. She remembered that when she was in the Defendant's bedroom, he told her to be quiet because he heard his brother coming.[35] She recalled that when she was on the bed with the Defendant, that first her cousin was next to him, and that she later ended up in the middle.[36] When the Defendant pulled his boxers to his ankles, D.M. described that they were "green and red and had bells on them."[37] When the Defendant began his assault, she testified that she was lying on her side with her back toward his belly, and "his penis went into my butt."[38] D.M. specifically recalled that the Defendant had taken a bed from the closet and put it on the ground, and that he moved her to that bed when he "put his penis in my vagina."[39] During this time, he then "went to stand in the corner of his room put lotion on his

[35] Trial Transcript, p. 548
[36] Trial Transcript, p. 550-551
[37] Trial Transcript, p. 551
[38] Trial Transcript, p. 551
[39] Trial Transcript, p. 550, 552

penis, and then put it into my vagina."[40] D.M. testified that it hurt when he penetrated her anally, but when he penetrated her vaginally, it "hurt even more than when he did it in my butt."[41] After the assault, D.M. remembered that the Defendant "gave me money for being a good sport, he said."[42]

D.M.'s recollection of the second incident was detailed as well: "he took me to his – the bedroom again of his room and he put his penis in my vagina after he held up the money and said: It's right there on the table. I went to grab it and he said: Not until after we're done."[43] She testified that the second incident "hurt, but not as much as last time."[44] She recalled hurting for two days after, and then it stopped.[45]

In addition to the descriptive testimony of D.M., the jury also learned that the Defendant had an established pattern of sexually victimizing minors. The Defendant was convicted in 2009 of Molestation of a Child in Maricopa County, Arizona. A certified copy of the conviction was entered as People's Exhibit 4, reflecting this conviction.[46] The Defendant also assaulted his own stepdaughter, A.C., in a manner similar to the victim, which the jury learned through A.C.'s testimony. A.C.'s mother had been married to the Defendant, at that at one point in time in their marriage, A.C. was living in Arizona with her mother and the

[40] Trial Transcript, p. 553
[41] Trial Transcript, p. 554
[42] Trial Transcript, p. 555
[43] Trial Transcript, p. 557
[44] Trial Transcript, p. 559
[45] Trial Transcript, p. 562
[46] Trial Transcript, p. 690

Defendant was living in Michigan.[47] In July of 2007, A.C. was 13 years old and travelled to Michigan from Arizona to visit an uncle. The Defendant picked her up at the airport and took her to his home above the Red Pepper Restaurant in Port Huron.[48] He asked her to watch a movie, just as his did with D.M. in the instant case.[49] During the movie, he put his hand up her shirt. He also struck her and pushed her around.[50] Then he took her to his bedroom where he penetrated her anally.[51] The Defendant then left for a few minutes, returned, and penetrated her vaginally.[52] A few days later, he again took her to his home, and engaged in anal and then vaginal penetration.[53] Approximately a week after that, the Defendant took her to a wedding with him and then made her spend the night at his home, where he engaged, again, in vaginal penetration with A.C. against her will.[54]

Although the assaults on A.C. were more physically abusive than those on D.M., the manner in which he penetrated her first anally and then vaginally within the same incident is significantly similar to the way he assaulted the D.M. on the first occasion. A.C.'s testimony strongly supported and corroborated D.M.'s testimony about her own assaults by the Defendant. In both cases, the Defendant went and picked up each victim and transported her to his apartment and showed

[47] Trial Transcript, p. 588
[48] Trial Transcript, p. 589.
[49] Trial Transcript, p. 593
[50] Trial Transcript, p. 594
[51] Trial Transcript, p. 595
[52] Trial Transcript, p. 597
[53] Trial Transcript, p. 602
[54] Trial Transcript, p. 606

her movies. He sexually penetrated both girls in their vagina and anus. He told them not to tell anyone about the acts. As to the Arizona conviction, he was convicted during the time he had fled Michigan after the investigation of D.M.'s case. Clearly, he had a common plan to sexually assault minors at every opportunity.

The probative value of the A.C.'s testimony in conjunction with that of D.M. becomes even greater because the two girls did not know each other at the time they were assaulted by the Defendant, at the time they disclosed, or during the investigation of either of their respective cases. The only time they met was the date that they were both in court for their trial testimony.[55] There was no possibility that they had collaborated or conspired together to wrongly accuse the Defendant.

Aside from the significant amount of evidence presented to establish that the Defendant assaulted D.M., his own actions showed consciousness of guilt. The jury was instructed pursuant to CJI2nd 4.4 (Flight, Concealment, Escape or Attempted Escape) that although evidence that the Defendant ran away does not prove guilt, it may be considered in determining whether he had a guilty state of mind.[56] Detective Colleen Titus testified that she attempted to find the Defendant after D.M. disclosed the assaults, and that when she found him, she advised him of the nature of her investigation.[57] By the time she was able to obtain a warrant to arrest

[55] Trial Transcript, p. 582, 608
[56] Trial Transcript, p. 769
[57] Trial Transcript, p. 641

him for assaulting D.M., however, he could not locate him in Michigan.[58] He was subsequently found in Mesa, Arizona, years later, having committed another offense against a minor in the meantime.[59]

In light of all of this evidence, even if the Defendant had been allowed to bring the prior assault before the jury, there is no reasonable likelihood that the jury's verdict would have been different. D.M. testified clearly and vividly about the assaults in a manner that could not have been explained away by the fact that she had been assaulted before by someone else. There were specific details of the assault that she remembered that could not be accounted for. She exhibited behavioral changes after the assaults that were remote in time to her previous abuse, which corroborated the fact that the Defendant assaulted her while she was visiting family. The Defendant engaged in a similar pattern of assaulting A.C., which provided compelling evidence to the jury both of his manner of victimizing minors, and corroboration and support for D.M.'s testimony. In addition, the jury learned that when the Defendant was told of the investigation pending against him, he immediately fled the state. Any rational jury would have convicted the Defendant on these facts, even if the trial court had admitted evidence that D.M. was abused by her stepfather years before the Defendant abused her. Therefore, even if this Court believed that the trial court erred in excluding the evidence, such error is harmless and reversal is not required.

[58] Trial Transcript, p. 647
[59] Trial Transcript, p. 648, 688

RELIEF REQUESTED

WHEREFORE, for the reasons state above, the Plaintiff—Appellee requests that this Honorable Court find that evidence of a child's prior sexual abuse is "sexual conduct" and therefore barred by the rape-shield statute; and further find that evidence of the prior assault on D.M. was not admissible in this case to preserve the Defendant's right to confrontation or to present a defense. In the event that this Court concludes that the Court of Appeals erred in making these findings, the Plaintiff—Appellee requests that this Court deem such error to be harmless, and affirm the Defendant's convictions and sentence.

Respectfully Submitted,

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